SUPREME COURT, U.S.
SEP 7 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1957.

No. 366

ILLINOIS CENTRAL RAILROAD COMPANY,

Petitioner,

vs.

ELIZABETH B. BOWMAN, as Conservator of the person and estate of CHARLES DALE BOWMAN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION.

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INDEX.

	PAGE
uestion Presented	1
atement of the Case	3
mmary of Argument	6
I. To allow Illinois Appellate Courts to reverse and remand cases brought under the Federal Employers' Liability Act on the theory that the verdict is contrary to the manifest weight of the evidence is to deny to F.E.L.A. cases in Illinois Courts that uniformity which Congress intended and without which its purposes cannot be effectuated.	7
II. The right to determination of all factual questions by the jury, not by a court of review, is a substantive right, not a procedural matter. To allow judges of a court of review to interfere with the conclusion of the jury because they themselves might have decided the issue otherwise, or because they do not agree with the verdict, is to vitiate the right to trial by jury.	11
III. In an action under Federal Employers' Liability Act a federal right is involved and the scope of review presents a federal question.	16
IV. The amount of the verdict is a matter of fact and is reviewed according to the same principles as any other fact issue.	21
nclusion	22
ppendix "A".	

Authorities Cited

Cases

Aetna Life Ins. Co. v. Ward, 140 U. S. 76 18
Bailey v. Central Vermont Co., 319 U. S. 350 ..... 12, 13, 18
Brady v. Southern Ry. Co., 320 U. S. 476 16
Brown v. Western Railway of Alabama, 338 U. S. 294 8
Corcoran v. City of Chicago, 373 Ill. 567 16
Dice v. Akron, C. & Y. R. Co., 342 U. S. 359 ..... 5, 8 12
Ellis v. Union Pacific R. Co., 329 U. S. 649 19
Fairmount Glass Works v. Cubs Fork Coal Co., 287 U. S. 474 22
Ferguson v. Moore-McCormack Lines, 352 U. S. 521 ..... 6, 20
Garrett v. Moore-McCormack Co., 317 U. S. 239 9
Harris v. Clinton, 143 Conn. 204, 112 Atl. 2d 885 10
Harsh v. Ill. Term. R. Co., 348 U. S. 940 ..... 2, 5, 6, 14
Hinds v. McNair, 129 N.E. 2d 553 10
Hime v. Sullivan, 188 Tenn. 605, 221 S.W. 2d 893 11
Hoffman v. Wagner, 149 Ohio 50, 77 N.E. 2d 467 11
Jacob v. New York City, 315 U. S. 752 11
Johnson v. Dept. of Labor & Industries, 46 Wash. 2d 463, 281 P. 2d 994 11
Kilpatrick v. B. of Rt., 210 S. C. 379, 42 S.E. 2d 891 11
In re King's Estate, 150 Tex. 662, 244 S.W. 2d 660 11
Lavender v. Kurn, 327 U. S. 645 ..... 2, 13, 19
Lindberg v. Bolon, 67 Ariz. 259, 194 P. 2d 454 10
Londrino v. Equitable Life Assur. Soc., 377 Pa. 543, 105 Atl. 2d 333 11
Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211 22
Pfingsten v. Westhaver, et al., 39 Cal. 2d 12, 244 P. 2d 395 10
Rain v. Balph, 293 P. 2d 359 11
Rogers v. Mo. Pac. Ry., 352 U. S. 500 ..... 2, 5, 6, 7, 12, 13, 20

Roland v. Murray, 239 S. W. 2d 967 11
Senko v. LaCrosse Dredging Corp., 352 U. S. 370 ..... 6, 19
Smith v. C., P. & St. L. Ry. Co., 236 Ill. 369 21
Smith v. Wichita Transport Co., 179 Kan. 8, 293 P. 2d 242 11
Tennant v. Peoria & P. U. Ry. Co., 321 U. S. 29 ..... 13, 18
Tiller v. Atlantic Coast Line, 318 U. S. 54 13
Wallace v. Ins. Co. of North America, 162 Neb. 172, 75 N.W. 2d 549 11
Webb v. Ill. Cent. R. Co., 352 U. S. 512 ..... 5, 6, 20
Wilcox v. Coons, 362 Mo. 381, 241 S.W. 2d 907 11

RULES

Revised Rules of the Supreme Court of the United States 19(a) 10

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BRIEF FOR RESPONDENT IN OPPOSITION.

QUESTION PRESENTED.

The sole question presented here is whether a state Appellate Court in an action under the Federal Employers Liability Act may reweigh the evidence on which a jury

reached its verdict and set aside that verdict as being contrary to the manifest weight of the evidence. This Court has already decided this issue adversely to petitioner on several occasions. (See *Rogers* v. *Mo. Pac. Ry.*, 352 U.S. 500; *Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940; *Lavender* v. *Kurn*, 327 U.S. 645).

There is nothing novel in this appeal.

STATEMENT OF THE CASE.

The Accident and Settlement.

The Respondent's ward sustained (among other injuries) multiple depressed skull fractures which ultimately caused him to be adjudicated a mental incompetent, and a conservator was appointed for him. While still suffering from the effects of the accident, but before his conservator was appointed, he executed a release in consideration of payment of $15,000.00.

The Proceedings In The Trial Court.

On trial of the case the Petitioner did not seriously contest its liability. The issues were, whether the release was valid, and the amount of the damages. The jury not only returned general verdicts in favor of Respondent's ward, but specifically found that at the time the ward executed the release, he was incapable of understanding what he was doing and unable to comprehend the terms and effect of the release.

The trial court in a post-trial memorandum held these verdicts not against the manifest weight of the evidence, and entered judgment on them.

The Proceedings In The Illinois Appellate Court.

The Appellate Court found the verdicts against the manifest weight of the evidence, and also held that various evidentiary errors had intervened. It reversed the judgment and remanded the case for a new trial.

Pursuant to the Illinois statute, Respondent filed an affidavit setting forth that on another trial she could not adduce further or different evidence, and moved that the court strike the remanding order from its judgment, so that she could appeal to the Illinois Supreme Court. This the Appellate Court refused to do.

The Proceedings In The Illinois Supreme Court.

Respondent thereupon filed a petition for leave to appeal in the Illinois Supreme Court, which assumed jurisdiction, found the refusal of the Appellate Court to strike the remanding order "arbitrary and contumacious," and proceeded to review the case. The Supreme Court found that there was ample evidence to sustain the jury's verdict, both on the question of release and on the question of damages, that the power of the Appellate Court to review the evidence supporting the verdicts was exhausted once their factual basis was apparent, and found further that no evidentiary errors intervened. It thereupon reversed the Appellate Court and affirmed the judgment of the trial court. The substance of the opinion of the Illinois Supreme Court was that the scope of review of the Appellate Court was limited to determining whether there was an evidentiary basis for the verdicts of the jury.

It is worthy of note that the dissenting justices in the Illinois Supreme Court filed an opinion which was later displaced by a second opinion. The second opinion appears at page 33-A of the Appendices filed by Petitioner. We have included the first opinion as an appendix to this Reply.

The dissenting judges in their first opinion, filed March 11, 1957, did not agree with the majority because they believed that the Supreme Court did not have the power to require the Appellate Court to strike the remanding order from its mandate—a matter of state procedure, not material here. In that opinion two of the three stated that the Appellate Court erred in its appraisal of the evidence. Thus, their dissent was bottomed on Illinois procedural rules. It was not until May 20, 1957, that they took the position that the method of review on the supervision of jury verdicts in state courts was a matter for local determination.

Petitioner states (page 7) that the opinion of the Illinois Supreme Court was founded primarily on the *Harsh* and *Dice* cases (*Harsh* v. *Ill. Term. R. Co.*, 348 U.S. 940; *Dice* v. *Akron, C. & Y. R. Co.*, 342 U.S. 359).

Petitioner fails to advise the court that an additional per curiam opinion was filed on rehearing with the *Rogers* and *Webb* cases (*Rogers* v. *Missouri Pac. R. Co.*, 352 U. S.; *Webb* v. *Ill. Cent. R. Co.*, 352 U.S. 512), considered at length together with many other decisions of this Court.

The conclusions reached by the Illinois Supreme Court were founded on a careful and conscientious review of all the cases decided by this Court which throw any light on the situation.

SUMMARY OF THE ARGUMENT

The only issue is whether a court of review can weigh the evidence in an action under the FELA and nullify the verdict of a jury when there is an evidentiary basis for that finding. The rules concerning the limited power of reviewing courts in this type of action have been articulated by this court on numerous occasions. One of those cases (*Harsh* v. *Ill. Term.*, 348 U.S. 940) was an appeal from an Illinois court. Because of these decisions, and particularly in view of a series of cases decided by this Court on February 25, 1957, (*Rogers* v. *Missouri Pac. R. Co.*, 352 U.S. 500; *Webb* v. *Ill. Central R. Co.*, 352 U.S. 512; *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370, and *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521), there is no doubt as to the proper method of treating an appeal in an action of this character. Accordingly, there exists no reason whatsoever for granting certiorari here.

Petitioner's contention concerning an Illinois statute whereby the evidence can be reviewed by an Appellate Court is an argument for a local rule of procedure, which is contrary, not only to the common law, as interpreted by this Court, but also to the uniform method of review enunciated by this Court for all FELA actions. Unless that uniformity is maintained, the rights conferred by the Act will be meaningless, since a court of review, in weighing the evidence, could emasculate the right of trial by jury. If such were permissible, the question would not be whether there was evidence to sustain the jury verdict, but whether the reviewing court agreed with the conclusion of the jury.

The question of damages was reviewed in this case at length by the Illinois Supreme Court. Evidentiary basis was found for both general and special verdicts. Damages are not reviewed in any manner different from other factual matters.

I.

To allow Illinois Appellate Courts to reverse and remand cases brought under the Federal Employers' Liability Act on the theory that the verdict is contrary to the manifest weight of the evidence is to deny to F.E.L.A. cases in Illinois Courts that uniformity which congress intended and without which its purposes cannot be effectuated.

It should be clear beyond peradventure that Congress and this Court are committed to the principle that the F.E.L.A. must be uniformly administered in matters of substance.

Many reasons have actuated this Court to require uniformity in the administration of the F.E.L.A. Amongst them are "The special features of this statutory negligence action that make it significantly different from the ordinary common law negligence action." (*Rogers* v. *Mo. Pac. R. Co.*, 352 U.S. 500, 509, 510.)

Again, the action itself, created as it is by statute, is unique in that contributory negligence, or assumption of risk play no part, and the negligence justifying recovery is singular to it. Then, too, the beneficiaries belong to a special group.

Perhaps the most cogent of all the reasons for uniformity is the fact that the right itself could be defeated if it were to be subjected to various local rules. Of that

danger, this Court has been well aware, and has repeatedly declared that state laws cannot control the incidents of this Federal right.

Attempted state laws, or rules of local procedure have manifested themselves in many forms. On each occasion they have been stricken down.

In the *Dice* case (*Dice* v. *Akron C. & Y. R. Co.*, 342 U.S. 359), the Ohio law provided that whether a release alleged to be fraudulently obtained would be set aside was a matter for a court and not a jury. This Court held that state law did not control, and had this to say:

> "Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes." (p. 362).

Further demonstration of how uniformity affects all incidents to the Federal right is *Brown* v. *Western Railway of Alabama*, 338 U.S. 294. Here a plaintiff failed to plead his case properly in accordance with the rules of pleading in Georgia, and a demurrer to his complaint was sustained. He stood on his complaint, and the suit was dismissed. One would naturally suppose that if any part of a lawsuit were to be considered procedural it would be the pleadings, and that a decision thereon would be completely within the competence of the state courts. However, this Court observed that "this federal right cannot be defeated by the forms of local practice," (p. 296) and went on to say, pp. 298, 299:

> "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws. 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' *Davis* v. *Wechsler*, 263 U. S. 22."

In the *Garrett* case (*Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239), the Pennsylvania state rule on the burden of proof in releases differed from the Federal rule. The state trial court set aside plaintiff's verdict on the ground that he did not sustain the burden of proof required under Pennsylvania law to invalidate a release. The state Supreme Court affirmed the judgment on the ground that the rule as to burden of proof on releases did not affect the substantive rights of the parties, but was merely procedural, and, therefore, controlled by state law. This Court held this was no mere procedural matter, saying:

> "The right of the petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted in admiralty as that right is, it was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure. *Central Vermont Ry. Co.* v. *White*, 238 U.S. 507, 511, 512; *Cities Service Co.* v. *Dunlap*, 308 U.S. 208, 212."

It is noteworthy that the Pennsylvania court in the Garrett Case said the plaintiff did not adduce sufficient proof. But this is exactly what the Appellate Court of Illinois said in this case. What distinction can be made between the two cases?

It is thus apparent that everything incidental to this Federal right, whether it be trial by court or jury, the sufficiency of a complaint, the burden of proof and sufficiency of evidence, or any other matter touching in any wise the right is to be treated according to uniform rules.

In view of these cases flatly holding that state law cannot control an incident to this Federal right, there is no meaning to Petitioner's argument that the power of state courts have been impinged upon. Obviously if, as here, they were to re-try the facts, railroad workers in Illinois courts would be deprived "of a goodly portion" of the relief intended for them.

Although the scope of review in F. E. L. A. actions has been determined in many cases, Petitioner seeks the issuance of the writ on the ground that there is a conflict between the opinion below and that of other state courts. It would suffice to say that such is not a reason when the opinion below is in accord with the decisions of this Court. (Rule 19-A of this Court).

Morevover, we have footnoted only some of the numerous state courts who refuse to weigh the evidence. Indeed, even the cases cited by Petitioner are not the law today in their particular jurisdictions.(1)

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(1)

Arizona—Lindberg v. *Bolon*, 67 Ariz. 259, 194 P. 2d 454.

California—Pfingsten v. *Westhaver*, et al., 39 Cal. 2d 12, 244 P. 2d 395.

Connecticut—Harris v. *Clinton*, 142 Conn. 204, 112 Atl. 2d 885.

Indiana—Hinds v. *McNair*, 129 N.E. 2d 553.

II.

The right to determination of all factual questions by the jury, not by a court of review, is a substantive right, not a procedural matter. To allow judges of a court of review to interfere with the conclusion of the jury because they themselves might have decided the issue otherwise or because they do not agree with the verdict is to vitiate the right to trial by jury:

Uniformity of administration means, as this court has often articulated, that the arena of court and jury be well defined. The right to trial by jury has been called "a basic and fundamental feature of our system of Federal jurisprudence." (*Jacob* v. *New York City*, 315 U. S. 752).

That same right has been described on repeated occasions as part and parcel of the remedy afforded railroad workers, under the Employers Liability Act, and

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Kansas—*Smith* v. *Wichita Transport Co.*, 179 Kan. 8, 293 P. 2d 242.

Kentucky—*Boland* v. *Murray*, 239 S.W. 2d 967.

Missouri—*Wilcox* v. *Coons*, 362 Mo. 381, 241 S.W. 2d 907.

Nebraska—*Wallace* v. *Ins. Co. of North America*, 162 Neb. 172, 75 N.W. 2d 549.

Ohio—*Hoffman* v. *Wagner*, 149 Ohio 50, 77 N.E. 2d 467.

Oklahoma—*Rain* v. *Balph*, 293 P. 2d 359.

Pennsylvania—*Londrino* v. *Equitable Life Assur. Soc.*, 377 Pa. 543, 105 Atl. 2d 333.

South Carolina—*Kilpatrick* v. *B. of Rt.*, 210 S.C. 379, 42 S.E. 2d 891.

Tennessee—*Hime* v. *Sullivan*, 188 Tenn. 605, 221 S.W. 2d 893.

Texas—*In re King's Estate*, 150 Tex. 662, 244 S.W. 2d 660.

Washington—*Johnson* v. *Dept. of Labor & Industries*, 46 Wash. 2d 463, 281 P. 2d 994.

to deprive them of the benefit of a jury trial, where there is evidence to support the verdict, means taking away a "goodly portion of the relief which Congress has afforded." (*Bailey* v. *Central Vermont Co.*, 319, U. S. 353, 354); *Dice* v. *Akron C. & Y. R. Co.*, 342 U. S. 359, 363).

And what is the jury's function in F. E. L. A. actions?

On many occasions this Court has defined it in detail. In *Rogers* v. *Mo. Pac. R. Co.*, 352 U. S. 500, wherein the Court granted certiorari to determine whether the Missouri Supreme Court invaded the jury's function, it was said at page 504:

> "But, as the probative facts also supported with reason the verdict favorable to the petitioner, the decision was *exclusively* for the jury to make." (Emphasis ours).

Can there be any clearer statement?

Petitioner has quoted a California intermediate court case decided in 1939 (*King* v. *Schumacher*, 32 Cal. App. 2d 172, 89 P. 2d 466). But in 1952, the California Supreme Court in *Pfingsten* v. *Westhaver*, 39 Cal. 2d 12, 244 P. 2d 395, said:

> "If there is any evidence which sustains the implied finding of the jury, its determination is final * * * 'When different conclusions may reasonably be drawn from the evidence by different minds the trial court's findings are not to be disturbed on appeal.'" (p. 13 Cal. Report)

So also has Petitioner referred the Court to an Oklahoma case (*St. Louis-San F. Ry. Co.* v. *King*, 278 P. 2d 845). But in 1956, the Supreme Court of that jurisdiction, in *Rain* v. *Ralph*, 293 P. 2d 359, reaffirmed the doctrine of *Lowe* v. *Hickey*, 176 Okla. 426, 55 P. 2d 769, to the effect that the conclusions of the jury will not be disturbed if they have a foundation in the evidence.

A footnote to this statement reads thus:

> "The very essence of (the jury's) function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant* v. *Peoria & P. U. R. Co.*, 321 U. S. 29, 35.

Again in the *Rogers* case, (*Rogers* v. *Mo. Pac. R.*, 352 U. S. 500), the limitations of the Court of review were thus described:

> "Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make the appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities." p. 506, 507.

Indeed, the recent decisions of this Court merely reinforce what this Court has been saying for years in its definition of the function of court and jury in F. E. L. A. actions.

In *Lavender* v. *Kurn*, 327 U. S. 645, (decided in 1943) the Court unequivocally stated that litigants were not free to re-litigate factual issues in a reviewing court, since it would be an undue invasion of the jury's historic function for a reviewing court to weigh the evidence, judge the credibility of the witnesses, and arrive at a conclusion opposite from that reached by a jury. There was cited *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54 (1943); *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350 (1943); and *Tennant* v. *Peoria V. P. U. R. Co.*, 321 U. S. 29 (1943).

But it is urged here that Lavender, Rogers, and the other cases referred to are not determinative of this question, since in those cases verdicts were directed for defendants, while in the instant case the court of review

remanded for a new trial. However, this precise question arose in this Court in *Harsh* v. *Illinois Terminal R. Co.*, 348 U. S. 940. That case also went up from Illinois. There the Illinois Appellate Court reversed and remanded for another trial on the ground that the verdict was contrary to the manifest weight of the evidence. There, as here, the plaintiff moved the court to strike the remanding order and the court in that case granted the application.

There the Illinois Supreme Court refused to interfere with the judgment of the Appellate Court and the plaintiff then petitioned this Court.

In that case Harsh contended in this Court as follows:

1. Federal holdings are controlling in state courts;
2. The state court was without authority to weigh the evidence and hold the verdict to be against the manifest weight of the evidence.

The railroad took the same position Respondent takes here, namely, that by virtue of an Illinois statute, the state Appellate Court could weigh the evidence, and in so doing, was only acting on a matter of procedure.

This Court granted certiorari, heard the matter on oral argument, and succinctly disposed of it thus:

> "Judgment Reversed. (*Lavender* v. *Kurn*, 327 U. S. 645." (*Harsh* v. *Ill. Term. R. Co.*, 348 U. S. 940).

What, then, did this Court decide in the *Harsh* case? It merely reaffirmed the principle of uniformity of the function of court and jury stated in the *Lavender* case, and that the Illinois Appellate Court had no right to weigh the evidence when there was an evidentiary basis for the verdict.

Thus the question of the right of an Illinois Appellate Court to weigh the evidence in F. E. L. A. cases has been definitely decided adversely to petitioner's contention.

Next, it is urged, however, that the Respondent was not denied a jury trial, since the order of the court of review was that the case be remanded for another trial, before another jury. It is argued, further, that the only reason Respondent is now denied another trial is because the remanding order was stricken, at her insistence.

This reasoning is fallacious. The Appellate Court pronounced Respondent's evidence inadequate, and took away her verdict. That decision, if not appealed from, became the law of the case. We have seen that Respondent filed an affidavit that she could produce no other or further evidence.

Therefore, if she went back to the trial court and retried her case, and was fortunate enough to again obtain a verdict, the trial court would be forced to set it aside. This process might continue indefinitely, or until a jury returned a verdict for the Petitioner. In short, the Illinois Appellate Court held that Respondent could never retain a jury's verdict, although it could not gainsay there was an evidentiary basis for a verdict in her favor. By awarding her a new trial through the implement of finding the verdict contrary to the weight of the evidence, they were presenting her with the shadow of a trial, and denying her the substance, for there could never be a recovery since the state Appellate Court opinion, unless reversed, would forever remain the law of the case.

Indeed, the Illinois Supreme Court recognized how the opinion of the Illinois Appellate Court in effect forever deprived plaintiff's ward of his remedy (Petitioner's App. p. 16-A).

We think the error which the Illinois Appellate Court fell into in this case will become apparent if we consider

this Court's pronouncement in the case of *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479:

> "Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states."

Let us suppose that this case had gone to trial in the federal court in Illinois, or in the state court in New York. With the same evidence, a verdict in favor of plaintiff would have ripened into a judgment. Here its only consequence, if the Appellate Court ruling be affirmed, is a series of retrials ad infinitum. Is this the "uniform federal rule" discussed in the *Brady* case?

III.

In an action under the Federal Employers' Liability Act a federal right is involved and the scope of review presents a federal question.

Although as we shall hereinafter point out, this Court has on numerous occasions articulated the scope open to review in an F. E. L. A. action, the Petitioner contends that the Illinois Appellate Court should be permitted a certain special, supervisory power over jury verdicts in these actions and be authorized to nullify a verdict if it disagrees with it, notwithstanding the verdict may have a basis in the evidence.

This argument overlooks the fact that this action involving, as it does, a Federal right, presents a Federal question. While it may be true that under the *Corcoran* Case (*Corcoran* v. *City of Chicago*, 373 Ill. 567), an Illinois Appellate Court may weigh the evidence in common law actions, such is immaterial here. We are dealing with that which goes to the essence of this federal right, namely, whether the trial is by jury or court.

Although the Illinois Supreme Court attempted to justify its position on common law principles in the *Corcoran* Case, it was in fact based upon the unique provisions of the Illinois statute. And as we, hereinafter, shall point out, this court has construed the common law review to be a review upon questions of law only.

Indeed, in seeking to ingraft upon an F. E. L. A. action this Illinois statute, Petitioner is making an argument for another "local rule of procedure," and one which goes to the heart of the action. If Illinois courts were by virtue of this local statute empowered to weigh the evidence in F. E. L. A. actions, not only would all hope of uniformity be destroyed, but the right to trial by jury would be emasculated. Of what avail is a jury trial in the first instance if the case can be appealed to a court who will try the facts? Under Petitioner's position, an appellate court could weigh the evidence and arrive at a conclusion different from that determined by the triers of fact, although there was evidence to support the verdict. An appellate court could disagree with the verdict, and nullify it as contrary to the manifest weight of the evidence. Indeed, an appellate court could handle these reviews as if the court of review were the jury. (As a classical example, witness the appellate court's conduct in this instance. Here it not only weighed the evidence, but then refused to give Respondent a final order, although the state statute made it mandatory for it to do so. It obviously was attempting to prevent review of its conduct).

As we have already stated, this Court has adhered to the time-honored principle that courts of review were limited to a consideration of errors of law where there is an evidentiary basis for the verdict. This Court has never recognized the right of any appellate tribunal to weigh the evidence.

Since 1891, when it decided *Aetna Life Ins. Co.* v. *Ward*, 140 U. S. 76, 91, this court interpreted the common law principles as prohibiting a review of the weight of the evidence and limiting its review to errors of law. We might further add that in addition to Federal Courts of review, courts throughout the country interpret the common law principles in the same manner.

This Court, realizing that if a jury verdict is to have meaning it must be respected on appeal, has specifically enunciated in no uncertain terms the limitation of the powers of reviewing courts in F. E. L. A. actions. No principle is better established than that once there is an evidentiary basis for a verdict in an F. E. L. A. action, such verdict cannot be disturbed because a court of review would have decided otherwise, or thinks the jury should have decided the case differently.

The first and leading case on this point, as applied to F. E. L. A. cases, is *Tennant* v. *Peoria & P. U. Ry. Co.*, 321 U. S. 29, decided in 1943. This Court said, in that case, p. 35:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

In another earlier case, *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350 (decided in 1943), the court said, pp. 353, 354:

> "The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasizes the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * as well as issues involving controverted evidence * * * To withdraw such a question from the jury is to usurp its functions."

Next we come to *Lavender* v. *Kurn*, 327 U. S. 645, decided in 1946. Here the court said, pp. 652, 653:

> "The jury having made that inference, the respondents were not free to relitigate the factual dispute in a reviewing court. Under these circumstances it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

In *Ellis* v. *Union Pacific R. Co.*, 329 U. S. 649, 653, (1947), the court said:

> "Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable."

In *Senko* v. *LaCrosse Dredging Corp.*, 352 U.S. 370 (1957), which involved an appeal from the Appellate Court of Illinois, where a judgment had been reversed for an employee in an action under the Jones Act (*Senko* v. *LaCrosse Dredging Corp.*, 7 Ill. App. 2d. 307), this court took occasion to explain that it did not ordinarily take cases to re-examine facts, but the lower courts apparently had not fully understood its holding that fact questions should be left to juries and went on to say, referring to the discretion as to facts with which a jury invested, p. 374:

> "The essence of this discretion is that a jury's decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury's estimate."

In *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, (1957) the court again adverted to the fact that (p. 510):

> "* * * Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury."

The cases of *Webb* v. *Illinois Central R. Co.*, 352 U.S. 512, and *Ferguson* v. *Moore McCormack Lines*, 352 U.S. 521, decided contemporaneously with the *Rogers* case, exemplify the same principle.

Moreover, as the Court pointed out in the *Rogers* case, it was the intent of Congress that questions of fact should be decided by the jury.

Footnote No. 18, page 508, to the *Rogers* v. *Mo. Pac. R. Co.*, 352 U. S. 500) opinion reads thus:

> "[18] While the primary reason was a protest against undue comment by trial judges as to the facts, the original 1906 Act provided: "All questions of negligence and contributory negligence shall be for the jury." 34 Stat. 232. Hearings before Senate Committee on Interstate Commerce on H. R. 239, 59th Cong., 1st Sess. 68-69. The inclusion in the 1908 statute of another provision, "All questions of fact relating to negligence shall be for the jury to determine," was proposed but not adopted. The view prevailed that this would be surplusage in light of the Seventh Amendment embodying the common-law tradition that fact questions were for the jury. Hearings before Senate Committee on Education and Labor on S. 5307, 60th Cong., 1st Sess. 8-9, 45-46."

Faced with this long list of cases, all decided by this Court and all upholding the sanctity of the jury's verdict, once its factual basis has become apparent, how can it be

argued that the Illinois Appellate Court has any right to set aside the jury's verdict, for the purpose of retrial or for any other purpose? If there is a basis for the jury's verdict, there is no basis for retrial.

IV.

The amount of the verdict is a matter of fact and is reviewed according to the same principles as any other fact issue.

Petitioner asserts that in its opinion the Illinois Supreme Court did not consider its contention that the amount of the verdict was grossly excessive and urges that the case should be reversed for a consideration of that question.

Petitioner fails to mention that the amount of damages is a question of fact, and is subject to the same principles of review as are other questions of fact. As the Illinois Supreme Court said in *Smith* v. *C. P. & St. L. Ry. Co.*, 236 Ill. 369, 371:

> "It is likewise insisted that the damages are excessive. Appellant refers to no text book or reported case which holds that the assessments of damages is a question of law. On the other hand, by every rule of law it must be considered a question of fact."

Since the amount of the damages is a question of fact, it follows that it must be treated as any other question of fact, and once the evidentiary basis for it appears, the appeliate court's function of review is exhausted. It must be remembered that the trial court which had the power to set the verdict aside or to require a remittitur because of excessiveness, expressly ruled against this contention (Appendices p. 82-A).

Furthermore, the basis for the award of damages was reviewed in detail in the opinion of the Illinois Supreme Court (Appendices, pp. 19-A—26A). It found an evidentiary basis for the award. No further review is proper.

Whether the issue relates to negligence, causation, damages, or the validity of a release, matters of fact are involved and the sole query on review is whether there is evidence to sustain the findings of the jury.

Moreover, it is well established in the Federal System that Federal courts of review do not interfere with the amount of damages awarded in an action of this character when a motion for a new trial has been denied. (*Fairmount Glass Works* v. *Cubs Fork Coal Co.*, 287 U. S. 474, 481.)

Petitioner refers to the *Bombolis* Case (*Minneapolis & St. L. R. Co.* v. *Bombolis*, 241 U.S. 211). Petitioner might have more appropriately noted that the United States Supreme Court has held that if a State gives a jury trial, it means a jury trial with the court and jury exercising the functions it has defined as proper for each in this statutory cause of action. (See *Dice* v. *Akron C. & Y. R. Co.*, 342 U.S. 359, 363, wherein the *Bombolis* Case is treated thus.)

Conclusion.

Regardless of what approach may be employed, the sole and only issue in this case is whether a court of review in an Employer's Liability action may re-weigh the evidence upon which the jury reached its verdict and nullify that verdict, although it has ample foundation in the evidence.

On numerous occasions, this Court, in unmistakable terms, has defined the province of a court of review in an action of this character. The granting of certiorari here would serve no purpose whatsoever.

It is respectfully submitted that the petition for certiorari be denied.

Respectfully submitted,

JAMES A. DOOLEY,
Attorney for Respondent.

APPENDIX A.

Original Dissenting Opinion
(Filed March 11, 1957)

JUSTICES SCHAEFER, HERSHEY, and DAVIS, dissenting:

We concurred in the unusual procedure by which this case was brought to this court, because of doubts we then entertained as to whether a verdict in a Federal Employers Liability Act case could be set aside as against the manifest weight of the evidence, or indeed, on any other ground. We have examined the question further, particularly the recent opinions in *Rogers* v. *Missouri Pacific Railroad Co.* ..... U.S. ....., and the other cases decided by the Supreme Court of the United States on February 25 of this year.

The conclusion that we draw from these cases is not in accord with that of the majority. In each of them the judgment brought before the Supreme Court was a final judgment; none involved a judgment that remanded the cause for a new trial. We conclude that it was not intended to eliminate entirely the historical attribute of common-law jury trial that makes it the duty of a judge to set aside a verdict that is against the manifest weight of the evidence. That power has consistently been recognized as an inherent part of trial by jury. (Cf. *Corcoran* v. *City of Chicago*, 373 Ill. 567.) The power of a receiving court to set aside a jury verdict entered in a Federal Employers Liability Act case has not been abrogated, although it is confined within narrow limits

(*Opinion.*)

In this case the plaintiff based his motion to strike the remanding order on section 75(2)(c) of the Civil Practice Act (Ill. Rev. Stat. 1955, chap. 110, par. 75(2)(c)). If the Appellate Court judgment had been based solely upon a finding that the verdict was against the manifest weight of the evidence, the statute would be applicable. But in addition the Appellate Court found that new trial should be ordered because of numerous errors which, in its opinion, deprived the defendant of a fair trial. In such a case, it is clear that the Appellate Court is not obliged to strike its remanding order, and this court has so held. (*Lees* v. *Chicago and North Western Railway Co.* 409 Ill. 536.) We there held that the statute did not apply to a case where the question involved was the competency of evidence offered by the defendant to establish a defense, but excluded in the trial court.

In this case the Appellate Court ruled specifically that the trial court erred (1) in allowing plaintiff's lay witnesses to express an opinion as to Bowman's competency without a proper foundation being laid, (2) in permitting plaintiff's witnesses to testify to conclusions instead of facts from which the jury could properly evaluate the testimony and draw inferences from facts, (3) in admitting hearsay testimony, (4) in refusing to receive in evidence 11 checks issued by Bowman on the bank account established with proceeds of his settlement and used by him in various important business transactions, (5) in rejecting the testimony of Bowman's lawyer regarding conversations with Bowman during settlement negotiations, (6) in permitting physicians to testify to subjective symptoms, (7) in permitting the plaintiff to attempt the impeachment of a defense witness on objectionable matters elicited on cross-examination, (8) in requiring de-

fendant's claim agent to testify regarding the customary fee in contingent cases, and (9) in considering before the jury whether the defendant's officers had complied with a certain *subpoena duces tecum*. Because of the foregoing, the Appellate Court did not deem it necessary to discuss alleged errors relating to the conduct of plaintiff's counsel, the refusal of tendered instuctions, and the amount of the verdict.

If the question of the Appellate Court's appraisal of the weight of the evidence in this case was open to review, Justices Schaefer and Davis would agree that the Appellate Court erred in its appraisal. Justice Hershey is in agreement with the Appellate Court on this question. However, section 92(3)(b) of the Civil Practice Act, (Ill. Rev. Stat. 1955, Chap. 110, par. 92(3)(b),) precludes this court from making that determination.

We are convinced this court did not have authority to require the Appellate Court to strike its remanding order. Therefore, it is our opinion that leave to appeal was improvidently granted and we are without jurisdiction in the case.